

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 96-0263

Responsible Officer Assessment

Sales Tax and Withholding Tax

**For The Periods 7/31/91 through 12/31/91; 2/29/92
through 12/31/92; and 1/31/93 through 12/31/93**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Responsible Officer Assessment - Imposition

Authority: IC 6-2.5-9-3; IC 6-3-4-8; IC 6-8.1-5-1; Van Orman v. State, 416 N.E.2d 1301 (Ind. App. 1981); Department of Revenue v. Hogo, 550 N.E.2d 1320 (Ind. App. 1990); Dunkerson v. Department of Revenue, 513 N.E.2d 209 (1987); Indiana Department of State Revenue v. Safayan, 654 N.E. 2d 270 (Ind. 1995); Ball v. Indiana Department of Revenue, 563 N.E.2d 522 (Ind. 1990); Muck v. United States, 3 F.3d 1378, 1381 (10th Cir. 1993); Wright v. United States, 809 F.2d 425, 417 (7th Cir. 1987)

The taxpayer protests imposition of the responsible officer assessment.

II. Tax Administration - Penalty

Authority: IC 6-8.1-10-2.1; IC 6-8.1-10-3

The taxpayer protests the imposition of the ten percent (10%) negligence penalty assessment.

STATEMENT OF FACTS

The taxpayer (President of R, Inc.) was assessed as a responsible officer by the Department for failure to remit withholding tax. The periods under assessment are 7/31/91 through 12/31/91; 2/29/92 through 12/31/92; and 1/31/93 through 12/31/93. The Department's records indicate that the returns were filed but no money was submitted to the Department. The taxpayer according to the Department's records, has made several payments. A total of three hundred

sixty dollars has been applied to the liability period 8/31/91, and four thousand three hundred dollars has been applied to the period ending 10/31/91.

Additional information will be provided below as necessary.

I. Responsible Officer Assessment - Imposition

DISCUSSION

The taxpayer protests his responsible officer assessment, and states that the amount of the assessment is incorrect and that there were numerous payments made either to a collection agency or directly to the Department. The taxpayer's assessment was based upon returns signed and filed by the taxpayer without payment.

Pursuant to IC 6-8.1-5-1(a), "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department." The notice of the proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made. See, IC 6-8.1-5-1(b).

The taxpayer stated that he would submit additional information showing that the amounts stated on the employee withholding forms was incorrect. The taxpayer submitted withholding tax vouchers for the year 1993. The taxpayer could not provide verification such as a Federal form 940 or 941. Nor could the taxpayer submit UC-1s, WH-1s, WH-3s, copies of its payroll journal or W-2s. Without this supporting documentation the Department cannot accept the taxpayer's withholding tax vouchers.

The tax in question is employee withholding tax. This tax is considered a trust tax because the taxpayer is obligated by law to hold the funds in trust for the state and thus may be held personally liable when the funds are not remitted. See IC 6-3-4-8(f). The Indiana legislature enacted this personal liability provision because when a business begins to falter, the trust taxes form a tempting reserve of cash.

Indiana Code section 6-3-4-8 a provides in pertinent part:

[e]very employer making payments of wages and subject to tax under IC 6-3, regardless of the place where such payment is made, who is required under the provisions of the Internal Revenue Code to withhold, collect and pay over income tax on wages paid by such employer to such employee, shall at the time of the payment of such wages, deduct and retain therefrom the amount prescribed in withholding instructions issued by the department. Such employer making payments of any wages:

- (1) shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld under this section and shall not be liable to any individual for the amount deducted from his wages and paid over in compliance or intended compliance with this section; and
- (2) shall make return of and payment to the department monthly of the amount of tax which, under IC 6-3 and IC 6-3.5, he is required to withhold.

Under Indiana law, a corporate officer has a "duty to remit" trust taxes if the "matter is within his discretion and subject to his will." Van Orman Id. at 1304. An individual is personally liable for unpaid withholding taxes if they are an officer, employee, or member of the employer who has a duty to remit the taxes to the Department. Dunkerson v. Department of Revenue, 513 N.E.2d 209 (1987). Various factors are relevant to determine who has such authority. First, the Department looks at the person's position within the power structure of the corporation. Second, the Department looks at the authority of the officer. The duties of the officer may include oversight and payment of tax liabilities. Finally, the Department considers whether the individual actually exercised control over the finances of the business. This would include, for instance, whether the person controlled the corporate bank account, signed corporate checks and tax returns, or determined when and in what order to pay creditors. The Department is not required, however, to prove that the taxpayer was the only responsible person. A party may be liable for trust taxes without having exclusive control over the corporation's funds. Department of Revenue v. Hogo, 513 N.E. 2d 209 (1990). Indiana Department of State Revenue v. Safayan, 654 N.E. 2d 270 (Ind. 1995).

The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid. See Hogo, Id. In the Safayan case cited above, the Indiana Supreme Court stated, "... where the individual was a high ranking officer, we presume that he or she had sufficient control over the company's finances to give rise to a duty to remit the trust taxes. The presumption is especially strong where the person was both a high ranking officer and a member of the board of directors and a major shareholder in a closely held corporation...." Id. at . However, this presumption can be rebutted by showing that the officer did not in fact have that authority. The Department will look to the articles of incorporation, by laws, or the individual's employment contract for a description of the explicit duties of the officer. The Department will also consider whether the officer actually exercised control over the finances of the corporation. The Indiana Supreme Court in the Safayan case analyzed the authority issue as it pertains to officers of a corporation and said:

... The Tenth Circuit, for instance, recently held... that "[t]he existence of such authority, irrespective of whether that authority is actually exercised, is determinative of liability. Muck v. United States, 3 F.3d 1378, 1381 (10th Cir. 1993)....

Id. at 275.

The Indiana Supreme Court went on to say:

... It strains credulity to imagine that... individuals in such positions may not look the other way with impunity while their business partners dispose of taxpayer money. Wright v. United States, 809 F.2d 425, 417 (7th Cir. 1987)....

Id.

The taxpayer is listed on the corporation's Business Tax Application (BT-1 dated 10/17/90) as President. The taxpayer also signed the Annual Withholding Tax Reconciliation Return for the calendar years 1993 and 1994. The taxpayer also signed and filed an S Corporation Return (IT-20S) for 1992 as President. Lastly, the Department's records contain an Indiana Annual Report of Business Corporation for the year 1995 filed with the Indiana Secretary of States Office on April 12, 1995 which contains the taxpayers name as President. It is apparent from the information provided by the taxpayer that the taxpayer did indeed have the requisite authority to control the business operation and had the authority to pay the tax liabilities. The Department therefore finds that the taxpayer is a responsible officer and is liable for the taxes due and owing.

FINDING

The taxpayer's protest is denied.

II. Tax Administration - Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty assessment.

Indiana Code section 6-8.1-10-2.1 imposes a ten percent (10%) penalty if a person fails to pay the full amount of tax shown on the person's return on or before the due date for the return. IC 6-8.1-10-2.1 requires the penalty to be imposed if the tax deficiency is due to the negligence of the taxpayer. Department regulation 45 IAC 15-11-2 provides guidance in determining if the taxpayer was negligent in nature.

Departmental regulation 45 IAC 15-11-1(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is also to be determined on a case-by-case basis according to the facts and circumstances of each taxpayer.

Subsection (d) of IC 6-8.1-10-2.1 allows the penalty to be waived upon a showing that the failure to pay the deficiency was due to reasonable cause. Departmental regulation 45 IAC 15-11-2(c)

requires that in order to establish reasonable cause, the taxpayer must show that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed. . . . "

In this instance, the taxpayer has not shown reasonable cause. The taxpayer has not provided to the Department's satisfaction, sufficient justification for filing its withholding tax returns without remitting any money.

FINDING

The taxpayer's protest is denied.